A CHRISTMAS SALUTE TO AMERICA

O America, cleft by ages—by continents, seas, and skies,
As far from that Birth in Asia, as far as the fire-drake flies;—
Yet have you read the Story writ in God's Advent there!
Yet may you share the Glory that Asia could not share!
First-born of any Nation the pages of History count
To dare in your legislation The Sermon on the Mount!
Even though greed's gier-eagle contend with your Eagle Blue;
Though selfish interest inveigle, and the mercenary mew;—
Stand, though the foe refutes you! Advance, though the fools debar!
The Son of God salutes you under His Christmas Star.

—Robert Nelson Spencer.

Christmas, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 717.

LOUISVILLE JOINT STOCK LAND BANK,
PETITIONER,

vs.

WILLIAM W. RADFORD, SR., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ADDITIONAL BRIEF FOR RESPONDENT.

The brief of the petitioner reached the counsel for the respondent on March 28, 1934. At that time, the original brief of the counsel for respondent who are filing this brief had been prepared. This additional brief is intended as an answer to the numerous and diverse contentions of the counsel for the petitioner, many of which are inaccurate in point of fact, and only two of which are true in point of law.

Two legal propositions are correctly stated by counsel for the petitioner:

(1) The Frazier-Lemke Act, to be valid, must not deprive the petitioner of its property without due process of law;

(2) It must likewise be a uniform law upon the subject of bankruptcies.

The issue in this case is clearly drawn in paragraph two, page 2, of the brief for the petitioner:

> "Whether a mortgagee is entitled to have the mortgaged property applied to the payment of his claim."

Using language accurately, from the standpoint of legal understanding, a mortgagee was never so *entitled*, as a fundamental right or otherwise. Originally, centuries ago, a mortgage was an instrument whereby the title to the property passed so absolutely to the mortgagee that in the absence of a stipulation to the contrary in the mortgage, the mortgagee was entitled to the immediate possession of the mortgaged property. If on the law day, that is the day for the payment of the debt which the mortgage was executed to secure, the debt was not paid in the precise manner specified in the mortgage, the "gage", that is, the property pledged, became dead or "mort" in the mortgagor, the title to the land became absolutely vested in the mortgagee, and the debt became likewise "mort" or extinct.

In that state of the law, a chancellor, himself an ecclesiastic, who had evidently delivered a sermon on the text (Psalms 111:9) "He sent redemption unto his people", discovered the doctrine known as the equity of redemption. Under this doctrine, the mortgagor was entitled to

redeem from an instrument executed by him, in direct contradiction of the language of the instrument itself and despite the existence of Magna Charta.

Under this doctrine as originally announced, the mortgagee had no legal rights whatever, except as the statute of limitations may have barred the equitable right of redemption. In those circumstances, "humbly complaining" and "in the name of God and conscience", as the old precedents read, the holder of the mortgage asked the chancellor, as an act of grace and not of right, to give to the mortgagee "such relief as in equity and good conscience, might seem meet and proper."

In those days, no one could in advance advise a chancellor just what relief the chancellor would or would not grant. The chancellor, as a matter of grace and not of right, extended such relief as in his understanding of conscience and equity, seemed meet.

We are reminded that Solomon (I Kings 8:59) prayed that God "maintain the cause of his servant and the cause of His people Israel at all times, as the matter shall require."

So it has always been the glory of the jurisprudence known as equity that the relief granted by the chancellor was adapted to the facts and circumstances of the case before the Court.

This Court is also reminded that the application of the Fifth Amendment is governed by the facts with respect to which the Court is pronouncing judgment. A statute may offend against the Amendment in one state of facts and may be immune from attack in another state of facts.

Indeed in bankruptcy, the first statute on the subject (34 and 35, Henry VIII, ch. 4, anno 1542), did not require in all cases a sale of the assets of the bankrupt. After authorizing a sale, the statute of Henry VIII continued:

> "or otherwise to order the same for true satisfaction and payment of the said creditors."
>
> 1 Remington on Bankruptcy (4th Ed.), page 6.

So that at all times, for several centuries, the right of a mortgagee may be defined as a right to apply to a Court for leave to foreclose the equity of redemption under a decree of the Court, or to sell the property described in the mortgage in such manner as the law permitted.

In effect, a mortgagee may be assimilated to a dealer in intoxicating liquors. Neither such a dealer nor a mortgagee foreclosing an equity of redemption are engaged in the enjoyment of a natural or inherent right. Both are exercising rights dependent upon the law for their existence; hence, subject to regulation.

For instance, a mortgagee:

(1) May not insert in a mortgage a provision waiving the equity of redemption.

(2) Where, as in Missouri, a deed of trust may be foreclosed by sale without a foreclosure in Court, the sale must be had in the form prescribed by statute.

(3) In many states, a mortgage may be foreclosed only by an action in the nature of a suit in equity.

(4) A Court, in a decree of foreclosure, may require the payment of an upset price.

(5) In some states, a sale may not be confirmed unless a certain portion of the appraised value is bid.

(6) In some states, unless a certain portion of the appraised value is bid, a period of redemption is allowed the mortgagor.

(7) In many states, a period of redemption from a sale under mortgage is allowed as a right; in others, as an act of grace.

(8) In foreclosing mortgages on public utilities, certain claims are allowed as preferential.

(9) In confirming sale of properties under mortgages, Courts pass on, approve, disappro[illegible] or modify plans of reorganization.

The newspaper account of the argument of the case intimated that Mr. Justice BRANDEIS seemed to be of the opinion, that under the Frazier-Lemke Act, the mortgagee not only lost his security, but also a right to bid therefor and to receive the proceeds of a sale.

This account of the hearing is not accurate. Nor does the mortgagee lose his security. If a farmer does not pay for the farm, in the manner permitted by the act, then the property is sold and the mortgage is paid out of the proceeds. If the farmer does pay for the farm, the mortgagee receives the proceeds of the payment.

As to the intimation of Mr. Justice BRANDEIS that a person who in no event could become the successful purchaser would not likely bid for the property, this may be admitted, but the farmer does not obtain the right to buy his former possession by being the highest, or perhaps

the only bidder. He pays the value of the farm fixed by a judicial decree.

As to a mortgagee being deprived of the asserted right to extinguish the title of a farmer "to his possession", (Lev. 25:13) the answer is: Under a law on the subject of bankruptcies, it is respectfully submitted that Congress in the absence of the Fifth Amendment, could have exercised its plenary, unlimited and paramount power by entirely cancelling the mortgage, including all its incidents. So, applying the test of reasonableness and the requirement that an Act of Congress must not be arbitrary, the proceeding at bar resolves itself into this proposition:

May an individual debtor be granted by way of exemption, in the enactment by Congress a uniform law on the subject of bankruptcies, the exclusive privilege of purchasing the property in which he has an equitable right of redemption, at the higher of two valuations fixed by a judicial decree rendered upon the hearing of evidence?

To answer this question in the negative, is to convert individual owners of real estate into tenants, and to say that while a corporation may reorganize its affairs in such a way as to give the bondholders, general creditors and stockholders in the old company an interest in the new company, a like result may not obtain in the case of an individual.

As to a mortgagee bidding on the property on which he has a lien:

Let us begin with a minority bondholder or bondholders in the case of a corporation. What right has he, as a practical proposition, to bid at a sale of the security for his debt? In such cases, the reorganization mana-

gers are usually the only bidders. The test of the fairness of the bid is not the bid itself, but the fairness of the plan of reorganization.

Again, in case of compositions, dissenting creditors are compelled against their will to accept the composition. In such cases, it is submitted the rights of the minority cannot, as a matter of law, be controlled by the will of the majority, but that the consent of the majority is merely evidential in its nature and a restraint upon a power which otherwise would be unlimited, the power of the court to make an equitable disposition of the assets of a debtor.

As to cancelling the unpaid portion of a secured debt. this result arises from the operation of the general bankruptcy law heretofore declared valid (186 U. S. 186).

It must be recalled that under Section 77, the validity of which is recognized in the Rock Island cases, decided by this Court, April 1, 1935, it is provided as to dissenting creditors (subdivision g, clause 6), adequate protection shall be provided "for the realization by them of *the value* of their securities, liens and claims" in one of three ways. One of these prescribed ways is (Sub. (g), par. 6, clause (c)), "by appraisal and payment in cash of either the value of such liens or claims or • • • the value of the securities allotted by the plan."

Mr. Chief Justice HUGHES called the attention of Mr. Lemke to the statement in paragraph 7, that the court "shall stay all proceedings for a period of five years." The words "all proceedings" must necessarily mean the proceedings with respect to the property of which the debtor retains possession under the terms of the Act.

A law must be construed sensibly and reasonably, to accomplish its purpose, and in the light of its spirit and intent.

As applied to the case at bar, the Court stayed all proceedings only with respect to the retained property (Rec., p. 80). As to the property not retained by Radford and not set apart as exempt, that property is immediately subject to sale and the proceeds thereof to distribution.

As to the five-year period, answering the question propounded by Mr. Justice SUTHERLAND:

Under the Minnesota Mortgage Moratorium Case, the District of Columbia Rent Cases and the Maryland Frazier-Lemke Case (4 C. C. A., In re Bradford, April 2, 1935), whenever the emergency of which the operation of the Frazier-Lemke Act is predicated no longer exists, the enforcement of the period ends.

And if Radford fails to pay the prescribed rent, as and when it falls due, then, according to the Act, "the court may order the trustee to sell the property * * *," which of course ends the moratorium.

As to whether or not a flat reduction of fifty per centum in the outstanding indebtedness of farmers may be upheld as a law on the subject of bankruptcies, a question asked by Mr. Justice SUTHERLAND, the theory of the dissent in the Gold Cases is that the Act therein held valid scaled all debts forty per cent. of their value, hence void. But under the doctrine of the Court in the Gold Cases, absent the Fifth Amendment, or on proof of reasonableness of such action, Congress might abolish all forms of debt entirely by a uniform law on the subject of bankruptcies.

Mr. Justice STONE was concerned with respect to that portion of the secured debt not represented by the value of the security. The Frazier-Lemke Act is an amendment of Section 75, National Bankruptcy Law, hence is a part of Section 75. Section 75 is an amendment of the law as a whole, hence a part of the law.

Turning to Section 57 (h), National Bankruptcy Law, we find a rule stated for the proof of secured claims. The value of the security is to be determined by "agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

So that, in the case at bar, the value of the security held by the lienholder is presently valued at $4,445, a general claim is now allowable for the balance, and on this balance, a dividend is immediately payable to be derived from a sale of the non-exempt and unencumbered property. The unpaid deficiency on such general claim is dischargeable in bankruptcy, just as unnumbered billions of such debts have been discharged since 1898 by operation of the general law on the subject of bankruptcies, or wiped out by the statute of limitations or the death of insolvent debtors.

Mr. Justice BUTLER inquired as to exempt property. In the case at bar, no realty was set apart as exempt to the debtor (Rec., p. 73). Certain personalty was set apart as exempt under the general bankruptcy law. A non-exempt balance of personalty was appraised (Rec., pp. 87, 88), also one-half acre of unencumbered real estate. But no disposition was made of such non-exempt unencumbered property; hence no question with respect thereto arises in this Court.

Mr. Justice McReynolds inquired as to the facts of this case. In a nut-shell:

(1) Radford in 1922 owned a farm valued in 1922 at $18,000 and in 1934, at $4,445.

(2) Radford executed two mortgages on which he failed to make the payments due in 1932 and thereafter.

(3) Absent the Frazier-Lemke Act, the lienholder, by reason of the statutes of Kentucky, would have been entitled to purchase Radford's farm at a foreclosure of the mortgage. Radford could have discharged the unpaid balance of his debt by filing a petition in voluntary bankruptcy and thereafter becoming a recipient of relief granted at public expense.

Neither the sale nor the rental value of the farm would have been increased by the process described. On the contrary, adding one more farm to the number now owned by the bank which it is compelled to rent to tenant farmers or is actively endeavoring to sell below the market value and at bargain prices, would not restore agricultural economic prosperity, but rather operate in the opposite direction.

What does the Frazier-Lemke Act accomplish, as applied to the facts of this case, and of which complaint is made:

(a) Radford, in effect, is granted a moratorium of six months, in each biennial period for five years. That is on December 1, 1934, the rental "for the first year for said property of which he retains possession" was fixed at $325, "and the payment of said rental shall be made to the trustee of the bankrupt on or before the first of May, 1935" (Rec., p. 82).

So at the end of six months, Radford is to pay one year's rental, that is, for six months last past, and six months in advance.

Radford, at any time within five years of December 1, 1934, may pay for his farm at $4,445, subject to the right of the lienholder to have the property revalued and to be paid the higher of the two values fixed by the court.

What is the net result of all this?

(a) If Radford does reacquire the title to the farm at a value fixed by the Court, and the farm thereafter increases in value, Radford will benefit thereby.

(b) If on the contrary, the lienholder buys the property at a foreclosure sale at a price approved by the court in confirming the sale, and the property thereafter increases in value, the lienholder will benefit thereby.

Congress put the man above the dollar, human welfare above corporate so-called prosperity.

"No man can serve two masters * * * Ye cannot serve God and mammon." (Consult Lev. 25; Deut. 151, 1; Micah 4:4):

"Choose ye this day whom ye will serve."

CLASSIFICATION.

Counsel for the lienholder complain in their brief that the Frazier-Lemke Act applies to "absentee-landlords." This was done to stabilize the value of farm property. Congress may classify the persons to whom a law on the subject of bankruptcies may apply (186 U. S. 186).

AMBIGUITIES.

A law cannot be held unconstitutional because it is ambiguious. To be unconstitutional, it must have a meaning, and that meaning must offend constitutional requirements.

But as applied to the procedure had in the case at bar, no ambiguity is pointed out nor reliance placed thereon.

AGGRIEVED DEBTOR.

Certainly a debtor, cannot within the meaning of subdivision (p) claim to be "aggrieved" by "the composition or extension" which he has offered and which has been accepted by the requisite number of creditors. But Radford did not change his mind, he did not repudiate a composition or extension previously made; he failed to obtain the consent of his creditors to an extension or composition (Rec., p. 13). See statement of lienholder, Rec., pp. 48, 49.

REFINANCING OF RADFORD.

Lienholder's claim that Radford did not refinance his mortgage is open to at least three essential defects:

(a) No showing is made that he might have borrowed any specific amount.

(b) No showing is made that the lienholder would have accepted in payment of its debt, what Radford might have borrowed.

(c) Radford was entitled to the debt reduction which he may enjoy by reason of the Frazier-Lemke Act, without continuing to carry a burden of debt beyond his ability to discharge.

DEED FROM RADFORD.

Counsel claim that Radford agreed to convey his farm to the lienholder in satisfaction of the mortgage debt. No relief was asked in the lower court predicated of such alleged agreement. No effort was made to specifically enforce such agreement. On the contrary, the bank accepted Radford's refusal to execute the deed as ending the alleged contract and in derogation of its alleged contract, proceeded to foreclose his mortgage.

RADFORD'S VALUATION.

Counsel for the lienholder note a coincidence:

(a) The appraisers valued the land at $4,445.

(b) The schedules of Radford fixed the value of the land at $4,450.

But what of it?

Lienholders introduced no evidence of the value of the land, although an opportunity to do so was afforded it (Rec., p. 99).

If lienholder contends a secret understanding existed between the appraisers and the debtor as to the valuation to be placed on the land. That issue should have been raised in an appropriate manner and testimony offered in support thereof.

The brief of Radford's counsel referred to by counsel for lienholder (Brief, p. 6, note), referred to an allegation in the original answer of the lienholder and thereafter eliminated by amendment. This brief is not preserved in the record before this Court.

VALUE OF PROPERTY.

Counsel for the lienholder state that "the appraisers fixed the value of the mortgaged property at $4,445." This valuation was identical as to the fair and reasonable value, as well as to the market value (Rec. p. 87).

BANK'S OFFER TO BUY.

The statement of counsel for the lienholder claim: "The Bank in open Court offered to pay $9,205.09 in cash for the property, mortgaged to it." Here is the crux of the case:

(a) Farmers are indebted beyond their ability to pay.

(b) Farms are mortgaged beyond their value.

(3) If lienholders have a constitutional right to bid the full amount of their debt and thus acquire the farms of the country, only one remedy remains: To refinance the farmer through governmental aid involving an inflation of currency and/or an increase of the public debt.

(4) What was the substance of the bid made by the bank? A bankruptcy court is a court of equity, and equity looks to substance, not to form. The cash to be paid in by the bank, "the aggregate of which sums is the amount of its mortgage debt * * *" (Rec. p. 72).

The record shows that all money paid in by the mortgagee would immediately have been returned to it "in satisfaction of its mortgage debt, if such offer be accepted" (Rec. p. 72).

Hence, the bank's offer to buy is a mere gesture designed to nullify the law; hence properly discarded as irrelevant.

STAY OF PROCEEDINGS.

Counsel for the lienholder object to the provisions (Rec. p. 80): "All proceedings • • • for the enforcement of any lien against the following described property be and the same are hereby stayed" (Rec., p. 80; brief, p. 7).

Lienholder cannot object if proceedings instituted by it are stayed, provided the law be valid; certainly cannot complain if others are likewise enjoined.

COSTS OF ADMINISTRATION.

Counsel for lienholder say that of the rental to be paid ($325): "administration expenses are to be deducted, leaving little of anything, to the Bank in the form of a cash rental payment."

The "administration expenses" of which this complaint is made, amount to $22.75, one per cent. to the referee and six per cent. to the trustee (Bankruptcy Law, Sections 40, 48).

The Circuit Court of Appeals did, as is contended by lienholder (Brief, p. 8), rule "that Congress could compel a secured creditor to accept an appraised value of the mortgaged property while permitting the debtor to keep such property, free and clear of the lien," but

(a) Such "appraised value" is necessarily subject to the approval of the court, upon evidence to be offered by the interested parties and the debtor, in order to "keep such property, free and clear of the lien" must pay such value so fixed as aforesaid.

WHAT IS A LAW ON THE "SUBJECT OF BANKRUPTCIES"?

In view of the decision of this Court in the Rock Island Cases (April 1, 1935) and of 4 C. C. A., In re Bradford

(the Maryland Case, April 2, 1935), and of the cases cited in the original brief for respondent, little more can be said.

"Distribution" as an element in a law on the subject of bankruptcies looms large in the consciousness of counsel for lienholder.

But the lienholder is not asking for "distribution"; it is asking for a debt to be paid in full to the exclusion of all others, and then in the course of its brief, clamors twenty-one times for "distribution".

As to the contention: "If it be that concentrated in the Federal government is the power to control every situation involving non-paying creditors, then the commercial life of each State is subject in large measure to Federal regulation:

(a) Such is the lament of Judge Wells (In re Klein, Fed. Cas. No. ....., overruled; In re Klein, Fed. Cas. .....).

(b) "Concentrated in the Federal government is the power to control every situation involving non-paying creditors" WHO HAVE BEEN ADJUDCATED BANKRUPT.

(c) No one claims that "Congress could divest State courts of jurisdiction over suits upon promissory notes between citizens of the same states" as to debtors not adjudicated a bankrupt, but such power does extent to suits against persons adjudicated a bankrupt.

National Bankruptcy Law, Section .....

(d) No one contends, ordinarily speaking, that "crimes such as the obtaining of goods or credits by false pretenses could be defined as crimes against the United States without regard to the powers reserved under the Tenth Amendment to the several states," but if such crimes are committed in contemplation of bankruptcy, a different result obtains.

(e) As to whether or not, "the lines between State and Federal governments could be largely redrawn," that is a continuous process and a never-failing subject of controversy, too large to be handled here.

UNITED STATES V. FOX.

On the theory of putting the best foot forward, counsel have thrice selected United States v. Fox, 95 U. S. 670, as their leading authority. (Note comment, Judge Simons.)

But in the Fox case, an important exception to the doctrine therein noted must not be overlooked. "An act" • • • cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress." So that an act having relation to the violation of the Bankruptcy Laws can be made an offense against the United States.

PRIOR STATE OF THE LAW.

Congress certainly is not limited to the prior state of the law on any subject within its jurisdiction.

Consult, The Rock Island Cases; The Bradford (Maryland Case, 4 C. C. A., April 2, 1935, opinion, 6 C. C. A., Rec., pp. 115 et seq.); Judge Dawson, Rec., pp. 52 et seq.; Judge Symes (In re Cope); Judge Otis (Brief, Respondent, pp. .....); In re Landquist (7 C. C. A.), 70 Fed. (2d) 929, 932, 933.

"SCALING DOWN DEBTS."

How can a bankruptcy law which permits a debtor to scale down his debts be invalid on that account?

In Hanover National Bank v. Noyses, 186 U. S. 186, Noyses owed debts in excess of his assets. He was held entitled to plead his discharge from a debt on which no dividend had been paid.

Senate Document No. 65, 72 Congress (1st Session) "The Report of the Attorney-General on Bankruptcy Law and Practice" is fairly overwhelming as to statistics of debts scaled down.

A country overburdened with debts must scale down or go bankrupt without hope of recovery.

GIVING PROPERTY TO DEBTORS.

Counsel for lienholder claim that Frazier-Lemke Act:

(a) "Is specifically directed against mortgagees and other secured creditors";

(b) "And was enacted for the very purpose of depriving them of the collateral for which they had bargained"; and

(c) "Of giving it to the farmer-debtor."

Specification (a) of this claim may be admitted. Congress was dealing with the subject matter therein described. Unsecured creditors, as a class were content to wait until agriculture had recovered. Secured creditors were foreclosing mortgages. Hence the necessity of protecting against the class described in the specification now under consideration. Congress in the enactment of

a uniform law on the subject of bankruptcies may specify the extent of the operation of such a law. (186 U. S. 186). For example, Section 3, specifies the persons against whom petitions may be filed. Consult Section 4. Section 8 relates to bankrupts who have died or have become insane. Section 17 is specifically directed against debts not discharged in bankruptcy. Section 29 is specifically directed against persons who commit offences. Section 60 is specifically directed against preferred creditors. Section 67 is specifically directed against certain liens declared invalid.

As to specification (b): An act which gives to a secured creditor the value of his collateral does not deprive him thereof. Nor does an act which requires a farmer debtor to pay the reasonable value of his farm in order to regain it, "give" such farm to the farmer debtor.

As to the remarks of Congressman Truax, brief page 15, in the original brief of respondent are collated the several speeches made in Congress prior to the passage of the act. If this court is going to sit in judgment on "the Congressional temper", it is respectfully requested that all of this literature be consulted.

The contention of counsel for lienholder that by reason of the appraisal of the farm at $4,445, the indebtedness of Radford "to the Land Bank was automatically scaled down to that sum," is not accurate.

(a) The Frazier-Lemke Act does not of itself scale down any indebtedness at all. So far as that act is concerned, a debtor by repurchasing his farm at the value fixed by the court, does not reduce his indebtedness in any amount. As to that share of the debt not represented by the value of the farm, the lienholder becomes a

general creditor of the bankrupt with a right to share in the distribution of the non-exempt unencumbered assets of the debtor. (Sec. 57 g, Nat. Bank. Law.) The scaling down only results from the fact that Radford may apply for his discharge under the general bankruptcy law.

As to the Land Bank being "compelled to accept such $4,445 in lieu of its $9,000 mortgage, with accumulated interest and charges," such is the natural incident of all proceedings in bankruptcy where the value of the assets is not sufficient to pay the debts in full. At the foot of its brief (page 16) petitioner refers again to the "cost of administration" without stating the amount thereof, $3.25 to the referee Sec. 40) and $19.50 to the trustee (Sec. 48).

TAXES, INTEREST AND INSURANCE.

As a result of the adjudication in bankruptcy, the title to Radford's farm passed from him to his trustee in bankruptcy (Sec. 70). In as much as under the Frazier-Lemke Act, Radford was required to pay "a reasonable rental annually for that part of the property of which he retains possession," it may fairly be said that Radford became a tenant of the trustee in bankruptcy. Certainly a tenant who pays a reasonable rental cannot be expected in addition thereto to pay taxes, insurance, interest or repairs. $220 is approximately five per cent. of $4,445 over and above the taxes on the land.

We are again told (brief p. 16) "the Land Bank was enjoined for five years, to wit until December 1, 1939, from enforcing its lien by the sale of the mortgaged property or otherwise; while Radford was expressly allowed to keep all his assets." This statement is quite as inaccurate as the general tenor of the brief for the petitioner. (a) As to the period of five years, this depends

on whether or not Radford pays the annual rental, subject to the right of the court to annually fix the amount of such rental subject to the continuance of the emergency of the existence of which the statutory moratorium is predicated.

(b) Radford was not expressly allowed to "keep" all his assets. The title to the assets passed to the trustee in bankruptcy. Radford became a tenant of part of them, the continuance of his tenancy being dependent on his paying annually the prescribed rental. His reacquisition of the title to his former assets was dependent upon his paying the reasonable value thereof as fixed by the court. Part of Radford's assets was set apart to him as exempt under the laws of Kentucky. The remainder of his assets are immediately subject to sale and distribution.

As to the statement (brief, p. 17): "Radford was given the opportunity to acquire at any time within five years, full ownership of the mortgaged property free of the lien," this statement partakes of that defect which seems to be congenital to the brief of the petitioner, that of inaccuracy. Radford does not have five years in which to acquire the property. To obtain that privilege he must pay the annual rental, for otherwise as provided at the end of paragraph 7 of sub-section s, of Sec. 75: "the court may order the trustee to sell the property as provided in this act." Radford could not acquire the title to the farm except by paying the reasonable value thereof as fixed by the court, an essential qualification of the statement made by counsel for the petitioner. The court has the right to terminate the five-year period at any time that its continuance migh be deemed unreasonable.

RADFORD'S OPTION.

In the brief of the counsel for the petitioner, considerable stress is placed upon the contention that Radford is granted an option to repurchase his farm of which he is at liberty to avail himself, if he so desires, or to refuse to take over the farm if he is of that opinion.

Primarily, in view of the plenary nature of Congress, it is entirely permissible for Congress to give Radford this option, provided such action on the part of Congress is deemed reasonable.

But examining the Frazier-Lemke Act in its entirety it will be seen that Radford is not given an option to repurchase his farm. Under the act, Radford is required "at the time of the first hearing" to petition the court "that he be allowed to retain possession of any part or parcel or all of the remainder of his property and pay for same under the terms and conditions set forth in this sub-section" (s).

Radford filed a petition of this nature, Record, p. 67.

The next step required by the act is outlined in paragraph 2 of sub-section (s) of Section 75. The steps outlined in this paragraph were taken.

Paragraph 3 contemplates that "the trustee * * * shall agree to sell to the debtor any part, parcel or all of the remainder of the bankrupt estate."

Radford made a request that "the trustee in bankruptcy herein * * * agree to sell" to Radford the farm formerly owned by him.

All this contemplates an actual agreement to sell, not merely an option to purchase. This thought is em-

phasized in paragraph 4 which refers to "an agreement having been reached as provided in sub-section (3)."

Taking up paragraph 7 of the Frazier-Lemke Act, we find that paragraph 7 is based on paragraph 3: "if any secured creditor of the debtor affected thereby shall file written objections to the manner of payments and distribution of debtor's property, as herein provided for", etc.

It thus clearly appears that paragraph 7 under review in this case, neither contemplates an agreement to sell nor an option to purchase. Paragraph 7 relates exclusively "to the manner of payment and distribution of debtor's property". The agreement to sell is found in paragraphs 3 and 4. So that a debtor under the Frazier-Lemke Act is not given an option to purchase. He is required to enter into an agreement to purchase. Section 7 relates merely, as already stated, "to the manner of payments and distribution of debtor's property".

But all of this discussion by the counsel for the lienholder, as to whether or not Radford is given an option to purchase or is required to enter into a contract or agreement to purchase is entirely immaterial. Radford owes the mortgage debt until he is discharged in bankruptcy. If he pays the debt he certainly pays for the property. If he fails to pay the debt and fails to get a discharge in bankruptcy, he remains indebted to the lienholder in an amount in excess of the purchase price. If circumstances entitle him to be discharged of the mortgage debt, he is certainly entitled to be discharged of any obligation to repurchase the property.

It is entirely possible that a debtor under Section 75 might acquire property which came to him after he filed his petition and that he might be discharged from the

debts that he owed when he filed the petition and retain his after-acquired property. Such a result obtains, however, from the operation of the general bankruptcy law, not from the Frazier-Lemke Act. It is also possible to conceive a state of facts under which a debtor might file a petition under Section 75 might thereafter acquire other property and at a still later date enter into an agreement to repurchase his farm. In that event the property which he acquired between the date of the petition and the date of the agreement to purchase might be liable for the obligation created by such agreement. But such a contingency is quite remote. It is impossible for a lawmaker to anticipate and provide for every circumstance that may arise. Progress is born of experience and every Act of Congress is subject to amendment and unfoldment. A law which does not provide for every circumstance that may arise is not for that reason void. But, in the case at bar, the essential fact remains that there is no evidence that Radford acquired any property between the date on which he filed his petition and the date on which he elected to repurchase his farm.

Again, the situation may be viewed in another light: Suppose Radford filed a petition as a debtor as he did, and then entered into an agreement to purchase the farm and thereupon filed a second petition as a debtor; under the second petition, he could get a discharge from all of his debts, including his obligation to repurchase the farm.

Complaint is made that Radford might be able to repurchase his property "at less than half of the mortgage debt". Suppose the Bank took over the land under a decree of foreclosure and sold the farm to another purchaser, the Bank could not expect to get the face amount of its debt for a farm valued at less than one-half of the debt.

As to the Land Bank being "deprived of its right of distribution measured as of the date of Radford's alleged bankruptcy" (brief, p. 17) this statement is somewhat difficult of comprehension.

(a) As to Radford's "alleged" bankruptcy, he was so adjudicated. No exception has been taken to that adjudication in the brief for the counsel for the petitioner.

(b) As to measuring the right of the Land Bank to a distribution as of the date of filing the petition in bankruptcy, an accurate understanding of the bankruptcy law discloses that, whether or not Radford repurchases his farm, the Land Bank here and now, as of the date of the filing of the petition in bankruptcy, is entitled to have allowed against the estate of Radford, a general claim for the difference between the value of its security and the amount of its debt, to have such of Radford's property which is non-exempt and unencumbered and of which he elects not to remain in possession to be sold, the proceeds distributed, and to receive a dividend on its general claim.

CONCLUSION.

Nothing in the brief for the counsel for the petitioner demands a reversal of the order of Judge Dawson, affirmed by United States Circuit Court of Appeals for the Sixth Circuit.

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